

Zentor (M) Sdn Bhd v Muniandy a/l Senggamalay

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HIGH COURT (MELAKA) — CIVIL APPEAL NO MT1–12–61 OF
2003

LOW HOP BING J

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23 OCTOBER 2008

Civil Procedure — Appeal — Appeal against decision of sessions court — Finding of fact after full trial — Allegation by defendant that trial judge had not recorded material facts in his notes of proceedings — Whether inaccuracies and omissions in judge's notes of proceedings amounted to fundamental misdirection which warranted appellate intervention — Whether defendant entitled to include its own version of what transpired in court as additional evidence in its appeal record

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Evidence — Presumption — Presumption that records of evidence in judicial proceedings were legally and correctly done — Whether defendant entitled to include its own version of what transpired in court as additional evidence in its appeal record — Evidence Act 1950 s 80

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The plaintiff, the registered owner of the land in the Mukim of Bukit Lintang, Melaka Tengah ('the land') and the defendant, housing developer, entered into a joint venture agreement ('the JVA') to develop the land into 29 houses, out of which the plaintiff was entitled to six. It was also a term of the JVA that the plaintiff would pay a sum of RM193,495 to the defendant as expenses for the development of the land ('development expenses'). When the plaintiff did not pay the development expenses, the defendant sold one of the six houses, which the plaintiff was entitled to, for RM222,897. After deducting the development expenses from the proceeds of sale of RM222,897, there was an excess of RM29,402.10 due and owing to the plaintiff. This excess sum was the subject matter of the plaintiff's claim against the defendant in the sessions court. The defendant in turn counterclaimed against the plaintiff to recover the 'shortfall' of RM29,970.75. After the hearing in open court, the trial judge found as a fact that the plaintiff had established his claim for of RM29,402.10 against the defendant and that there was no evidence to substantiate the defendant's counterclaim. This was the defendant's appeal against that decision. In the course of its appeal the defendant alleged that the trial judge who had heard the witnesses in open court had not recorded their evidence at all or had intentionally recorded it inaccurately. The defendant therefore contended that the trial judge had not recorded material facts in his notes of proceedings

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- A** and that the inaccuracies and omissions in the judge's notes of proceedings amounted to a fundamental misdirection on the part of the trial judge which warranted appellate intervention. As such, the defendant attempted to include this evidence that was allegedly excluded or included inaccurately in the trial judge's notes of proceedings as additional evidence in its appeal record.
- B** The plaintiff argued that that the notes of proceedings recorded by the judge were free from inaccuracies or omissions.

C **Held**, dismissing the appeal with costs:

- (1) The allegation leveled at the trial judge who was very senior in service was unacceptable. In addition, since the allegation was made by the defendant as the defeated party, it deserved even more careful consideration (see para 9).
- D** (2) By s 80 of the Evidence Act 1950 it was presumed that the version of the evidence that the trial judge had recorded of the evidence of the witnesses was the correct and accurate version (see para 12).
- E** (3) The additional evidence, which the defendant sought to include in its appeal record because it was allegedly omitted from the trial judge's notes, could only be included with the leave of the court hearing the appeal. However, the defendant had attempted to unilaterally include the additional evidence as part and parcel of its appeal record. This ran counter to the rules of natural justice as the plaintiff was deprived of the opportunity to present his views on the inclusion or exclusion of the additional evidence. Therefore the inclusion of the additional evidence in the defendant's appeal record was highly improper and legally unsustainable (see para 14).
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- G** (4) A proper perusal of the appeal record, after rejecting the developer's own version of what transpired in the court room, showed that the trial judge had embarked on a careful and objective judicial appreciation of the evidence adduced to arrive at his judgment. As there was no appealable error to justify appellate interference, the defendant's appeal was without merits (see para 21).
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[Bahasa Malaysia summary]

- I** Plaintiff adalah pemilik berdaftar ke atas sebidang tanah di Mukim Bukit Lintang, Melaka Tengah ('tanah') dan defendan adalah pemaju perumahan, telah memasuki satu perjanjian usahasama ('PUS') untuk membangunkan tanah tersebut kepada 29 buah rumah, yang mana plaintiff berhak kepada enam buah daripadanya. Adalah terma PUS bahawa plaintiff perlu membayar sebanyak RM193,495 kepada defendan sebagai perbelanjaan bagi

membangunkan tanah tersebut ('perbelanjaan pembangunan'). Apabila plaintif tidak membayar perbelanjaan pembangunan, defendan telah menjual sebuah daripada enam buah rumah yang mana plaintif berhak ke atasnya pada harga RM222,897, terdapat lebih RM29,402.10 tertunggak dan terhutang kepada plaintif. Lebihan ini adalah perkara utama tuntutan plaintif terhadap defendan di mahkamah sesyen. Defendan, dalam balasan, menuntut balas terhadap plaintif untuk mendapatkan kembali defisit jumlah RM29,970.75. Selepas pendengaran di mahkamah terbuka, hakim bicara telah mendapati bahawa plaintif telah membuktikan tuntutannya untuk sejumlah RM29,402.10 terhadap defendan dan oleh itu tidak terdapat keterangan untuk mengesahkan tuntutan balas defendan. Ini adalah rayuan defendan terhadap keputusan tersebut. Semasa rayuan defendan mendakwa bahawa hakim bicara yang telah mendengar saksi di mahkamah terbuka tidak langsung merekodkan keterangan mereka atau secara sengaja telah merekodkannya secara tidak tepat. Oleh itu defendan menegaskan bahawa hakim bicara telah tidak merekodkan fakta material di dalam nota prosiding dan ketidak tepatan dan perkara yang tertinggal di dalam nota prosiding hakim merupakan asas salah arah yang hakim bicara yang mewajarkan campur tangan mahkamah rayuan. Oleh itu, defendan telah mencuba untuk memasukkan keterangan ini yang didakwa tidak dimasukkan secara tepat di dalam nota prosiding hakim bicara sebagai keterangan tambahan di dalam rekod rayuannya. Plaintif mengatakan bahawa nota prosiding yang direkodkan oleh hakim adalah bebas daripada ketidak tepatan dan ketinggalan.

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Diputuskan, menolak rayuan dengan kos:

- (1) Dakwaan yang ditujukan kepada hakim bicara yang begitu kanan dalam perkhidmatan tidak dapat diterima. Selanjutnya tambahan, oleh kerana dakwaan dibuat oleh defendan sebagai pihak yang tewas, ianya patut diberikan pertimbangan yang lebih berhati-hati (lihat perenggan 9).
- (2) Menurut s 80 Akta Keterangan 1950, adalah dianggap bahawa versi keterangan yang direkodkan oleh hakim bicara terhadap keterangan saksi-saksi adalah versi yang betul dan tepat (lihat perenggan 12).
- (3) Keterangan tambahan, yang diminta oleh defendan untuk dimasukkan di dalam rekod rayuannya kerana ianya didakwa tidak dimasukkan dalam nota hakim bicara hanya boleh dimasukkan dengan kebenaran mahkamah yang mendengar rayuan. Walau bagaimanapun defendan telah mencuba untuk secara sepihak memasukkan keterangan tambahan sebagai sebahagian rekod rayuannya. Ini bertentangan dengan peraturan keadilan asasi kerana plaintif telah dirampas peluang untuk mengemukakan pandangannya terhadap kemasukan atau

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- A pengeluaran keterangan tambahan. Oleh itu, kemasukan keterangan tambahan di dalam rekod rayuan defendan adalah sungguh tidak wajar dan tidak boleh diterima secara perundangan (lihat perenggan 14).
- (4) Penelitian rekod rayuan yang wajar, selepas menolak versi tersendiri
- B pemaju atas apa yang terjadi di dalam bilik mahkamah, menunjukkan bahawa hakim bicara secara berhati-hati dan objektif menggunakan penghayatan kehakiman ke atas keterangan yang dikemukakan untuk mencapai keputusannya. Oleh kerana tidak terdapat kesilapan yang boleh dirayu untuk menjustifikasikan campur tangan mahkamah rayuan, rayuan defendan tidak bermerit (lihat perenggan 21).]
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Notes

For cases on appeal against decision of sessions court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 682–683.

- D For cases on presumption generally, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2011–2115.

Cases referred to

- Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (folld)
- E *New Tuck Shen v PP* [1982] 1 MLJ 27; [1982] CLJ (Rep) 606, HC (refd)

Legislation referred to

Evidence Act 1950 s 80

- F Subordinate Courts Rules 1980 O 28 r 1, O 28 r 12, O 28 r 13

Appeal from: Summons No (2)–52–172 of 2001 (Sessions Court, Melaka)

Nizam Bashir (Bashir, Wong, Chin & Partners) for the appellant.

- G *Anis Hasliza (Hafidz & Co) for the respondent.*

Low Hop Bing J (now JCA):

APPEAL

- H [1] On 2 December 2003, the learned sessions court judge ('the trial judge') allowed the plaintiff's claim in the sum of RM29,402.10 against the defendant; dismissed the defendant's counterclaim; and awarded to the plaintiff costs, including the costs in amending the defendant's defence and counterclaim. This is the defendant's appeal against the aforesaid orders.
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FINDING OF FACTS

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[2] After a full trial, the trial judge's finding of facts may be narrated below.

[3] The defendant was a housing developer ('the developer'), while the plaintiff was the registered owner of the land ('landowner') held under Geran Mukim No GM 163, Lot No 2607, in the mukim of Bukit Lintang, district of Melaka Tengah ('the land').

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[4] On 25 September 1995, the developer and the landowner entered into a joint venture agreement ('JVA') to develop the land into 29 houses, out of which the landowner was entitled to six. The landowner admitted that he had to pay a sum of RM193,495 towards the expenses for the development of the land. The land was charged to a bank as security for a loan in the sum of RM175,000 to them. They have to repay the loan equally ie RM87,500 respectively.

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[5] As the landowner did not pay the development expenses of RM193,495, the developer had sold the house erected on Lot 782 for RM222,897. Lot 782 was one of the six houses to which the landowner was entitled. After deducting the development expenses of RM193,495, there was an excess of RM29,402.10 due and owing to the landowner. That was the subject matter of the landowner's claim against the developer in the sessions court.

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[6] On the other hand, the developer has included a counterclaim against the landowner to recover the 'shortfall' of RM29,970.75.

NOTES OF PROCEEDINGS

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[7] The thrust of the submission of learned counsel Mr Nizam Bashir for the developer rests on his allegation that the trial judge had not recorded material facts in his notes of proceedings. Counsel referred to his own affidavit which he affirmed on 24 March 2004 ie three months and 22 days after the decision has been delivered by the trial judge on 2 December 2003. In his affidavit, he averred that there were inaccuracies and omissions in the trial judge's notes of proceedings. He annexed his own version of the evidence as exhibit at pp 49 D-L of the appeal record which, he said, had been adduced at the trial but was not recorded or was recorded inaccurately. He added that the inaccuracies and omissions amounted to fundamental misdirection on the part of the trial judge, and so warranted appellate intervention.

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- A [8] His learned friend Miss Anis Hasliza acting for the landowner argued that the notes of proceedings recorded by the trial judge are free from inaccuracies or omissions.
- B [9] In my judgment, I must stress that this kind of allegation is exceptionally rare, especially where this issue is raised several months after the decision of the trial judge had been delivered. Since the allegation was made by counsel for the developer as the defeated party, it certainly deserves even more careful consideration here. Hence, in all fairness to the parties and also to the trial judge, it is imperative that I give a definitive ruling in this regard.
- C [10] It must be placed on record immediately that the proceedings at the trial had been heard in open court: O 28 r 1 of the Subordinate Courts Rules 1980. Order 28 rr 12 and 13, which provide respectively for the recording of the notes of evidence and the demeanour of the witnesses, read as follows:
- D Notes of evidence. (O 28 r 12).
12 The Court shall take a note of the evidence, stating the terms of any particular question or answer if there appears to be any special reason for doing so, and shall make a note of the judgment given or order made in any action and shall sign or initial the same.
- E Remarks on demeanour of witness. (O 28 r 13).
13 The Court may record on the notes of evidence such remarks as it thinks material respecting the demeanour of any witness while under examination.
- F [11] The developer's allegation that pp 49 D–L of the appeal record containing nine pages of evidence had been adduced for the parties herein but had not recorded or had been recorded inaccurately would suggest that the trial judge had been hearing the witnesses and had not been recording the evidence at all or had intentionally recorded it inaccurately.
- G [12] With respect, I am unable to accept the allegation levelled at the trial judge who is very senior in service. Instead, I accept the version of the evidence that the trial judge had recorded and now transcribed at pp 41–48 of the appeal record setting out eight pages of the evidence of the witnesses as the correct and accurate version. Section 80 of the Evidence Act 1950 provides for the presumption as to documents produced as record of evidence. The relevant portion merits reproduction as follows:
- H Presumption as to documents produced as record of evidence.
- I 80 Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding... taken in accordance with law and purporting to be signed by any ... Sessions Court Judge, the court shall presume that —
(a) the document is genuine;

- (b) ...; and
- (c) such evidence ... was duly taken.

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[13] Section 80 was applied by Wan Yahya J in *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27; [1982] CLJ (Rep) 606 (HC) Melaka which was cited for the developer herein. The facts there showed that contrary to the notes of evidence as recorded by the learned president of the sessions court, newspaper cuttings, inter alia, showed that what the learned counsel allegedly said in the court was that his client 'had been led into believing that the deputy public prosecutor would not be pressing for deterrent sentence and the court would be persuaded into giving a lenient sentence'. Counsel relied on the newspaper report to press home the point that, had it not been for what the learned deputy had said, he would not have advised the appellant to enter a guilty plea to the charge. On this issue, His Lordship held as follows:

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- (1) Newspaper reports of court cases are by no means absolutely accurate verbatim reports of what actually transpired in the court room. Counsel should realise that it will require more than newspaper cuttings to discredit the written words of a trial president.
- (2) By s 80 of the Evidence Act, it is presumed that the records of evidence in judicial proceedings were legally and correctly done. Counsel may rebut this presumption by the introduction of proper contrary additional evidence, such as the introduction of affidavit by himself or the court's staff, or perhaps the newspaper reporters concerned. This was not done.

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[14] Reverting to the mainstream of the instant appeal, it is to be noted that the additional evidence which the developer sought to include in the appeal record can only be included with leave of the court hearing the appeal. In order to include counsel's affidavit as additional evidence, it is essential for him to file a notice of motion to apply for leave from the appellate court. That notice of motion must be supported by an affidavit setting out the grounds for the inclusion of the additional evidence. The landowner has to be given the opportunity of hearing on whether there was consent or objection to that application. However, the developer has not done so. What the developer's counsel did was to unilaterally include the additional evidence in the pious hope that it forms part and parcel of the appeal record so that the court would in any event treat it as such. That in my view certainly runs counter to the rules of natural justice as the landowner is deprived of the opportunity to have his day in court and present his views on the inclusion or exclusion of the additional evidence. I find the inclusion of the additional evidence highly improper and is legally unsustainable. It is hereby rejected from the appeal record.

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- A [15] In *Cheng Hang Guan & 2 Ors v Perumahan Farlim (Penang) Sdn Bhd & 3 Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19 (HC), on which the developer herein relied, one of the issues concerns the tenanted area ie whether it was 9,000 sq ft or three acres. Edgar Joseph Jr SCJ (as he then was) speaking for the Supreme Court found that the notes of proceedings recorded by
- B Mustapha Hussain J was incomplete. After careful consideration, the Supreme Court found that the area in question was 2.8 acres or approximately 121,619 sq ft. The relevant ratio there relates to the finding of facts rather than the inclusion or exclusion of additional evidence to establish the alleged inaccuracies or omissions.
- C [16] I am unable to find any part of the Supreme Court judgment which is helpful to the developer herein.
- D [17] Be that as it may, I shall consider the merits of the defendant's appeal.
- MERITS OF APPEAL
- E [18] In contending for the developer that the trial judge erred in giving judgment for the landowner and in dismissing the defendant's counterclaim, the developer reverted to counsel's affidavit and treated the aforesaid pages therein as additional evidence to disprove the plaintiff's claim and to establish the counterclaim.
- F [19] The plaintiff's response is that the plaintiff has proved its claim and that the defendant has failed to establish its counterclaim.
- [20] The trial judge found as a fact that:
- G (1) the plaintiff has established his claim for RM29,402.10 against the defendant by deducting the sum of RM193,495 from the proceeds of sale ie RM222,897.10; and
- (2) there is no evidence to substantiate the defendant's counterclaim.
- H [21] In my judgment, with the rejection of the developer's own version of what transpired in the court room and of the evidence of the witnesses who testified at the trial, I need only consider the evidence recorded by the trial judge. Upon a proper perusal of the appeal record, I find that the trial judge had embarked on a careful and objective judicial appreciation of the evidence adduced before him. He has thereafter arrived at a finding of facts which
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forms the basis of his judgment. I am unable to identify any appealable error to justify appellate interference.

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CONCLUSION

[22] On the foregoing grounds, I hold that this appeal is without merits and is hereby dismissed with costs. I therefore affirm the aforesaid orders of the trial judge.

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[23] Counsel for the landowner applied for the release of the judgment sum which the developer has deposited with the developer's solicitors for the purpose of satisfying the said judgment sum, together with all interest accrued thereon. The developer has raised no objection. I now make an order that the said deposit sum together with all interest accrued thereon be released to the landowner in satisfaction of the judgment sum and the interest accrued. Thereafter, the landowner is at liberty to effect execution on the balance thereof, if any.

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Appeal dismissed with costs.

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Reported by K Nesan

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